Supreme Court, U.S.
FILED
DEC 21 1985
JOSEPH F. SPANIOL, JR.
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No. 84-1974

In The Supreme Court of the United States

October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether *Sandstrom* error in the context of a mandatory rebuttable presumption is subject to harmless error analysis.

2. Whether the respondent's defenses placed in issue the element of malice so as to preclude harmless error analysis.

3. Whether, in any event, the evidence of malice is overwhelming and so dispositive of intent as to render the *Sandstrom* error harmless.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-1—A-6). The opinion of the district court is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-7—A-21). The opinion of the Tennessee Court of Criminal Appeals is unreported and is reproduced in the Ap-

pendix to the Petition for Writ of Certiorari. (Pet. App. A-23—A-39).

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1985. The petitioner's petition for a writ of certiorari was filed on May 30, 1985, and was granted on October 7, 1985.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated Section 39-2401 (1975 Replacement) provided:

> If any person of sound memory and discretion, unlawfully kills any reasonable creature in being, and

[1]The grant of the petition was limited to Question 2.

> under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Tennessee Code Annotated Section 39-2402 (1975 Replacement) provided, in pertinent part:

> An individual commits murder in the first degree if:
>
> (1) He commits a willful, deliberate, malicious and premeditated killing or murder.

Tennessee Code Annotated Section 39-2403 (1975 Replacement) provided:

> All other kinds of murder shall be deemed murder in the second degree.

STATEMENT

The respondent, Stanley Barham Clark, was indicted by the Rutherford County, Tennessee Grand Jury on two (2) counts of first degree murder in the slayings of Joy Faulk and Charles Browning. Following a jury trial, the respondent was convicted of the first degree murder of Faulk; punishment was assessed at life imprisonment. The respondent was also convicted of the second degree murder of Browning; punishment was assessed at ten (10) years imprisonment.

The respondent did not challenge the malice instructions in the trial court. However, on appeal to the Tennessee Court of Criminal Appeals, the respondent challenged these instructions on the ground that they impermissibly shifted the burden of proof on the element of malice. The state appellate court rejected the respondent's

contention and affirmed the jury's verdict. The Supreme Court of Tennessee subsequently denied the respondent's application for permission to appeal.

The respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee, alleging that the malice instructions violated due process of law pursuant to *Sandstrom v. Montana*, 442 U.S. 510 (1979). The district court agreed with the respondent's contention and granted a writ of habeas corpus ordering the state of Tennessee to retry the respondent within ninety (90) days or release him. This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit.

A. The Offenses

On the night of December 30, 1978, Joy Faulk and Charles Browning were shot to death while seated in Browning's truck in a rural area of Rutherford County, Tennessee.[2] Faulk's young daughters, Mitzi and Michelle, were present at the time of the slayings and were found shortly thereafter wandering along a roadway in search of assistance. (J.A. 43). That night and at trial, Mitzi identified the respondent as the individual responsible for committing the homicides. (J.A. 33-35, 37-38, 40).

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[2]Browning was shot once in the head from a distance of six to eight inches; Faulk was shot three times (twice in the head and once in the shoulder) from a distance of less than eighteen inches. (J.A. 23, 25, 28-29, 31-33, 35, 76-79).

The discovery of four .25 caliber shells in the interior of the truck established that the perpetrator held the weapon inside the cab while shooting the victims. (J.A. 19, 20-21, 27-28).

Prior to the shootings, the respondent was observed pursuing Browning's truck some ten miles from the homicide scene. (J.A. 14-15). After the discovery of the bodies, the respondent was apprehended in the vicinity of his home following a high speed chase. (J.A. 10-13). The weapon used to commit the homicides, a Targa Excam .25 caliber automatic pistol, was later discovered along the route taken by the respondent as he fled the police. (J.A. 21-22).

Investigation showed that the respondent had borrowed the murder weapon from Terry Hill some two weeks before the slayings, untruthfully telling Hill that his own gun had been stolen. (J.A. 74-75, 80). Although he was observed in possession of the murder weapon the week of the homicides, the respondent later denied having it in his possession at that time. (J.A. 72-73).

Further investigation revealed that Faulk and the respondent had been involved in a stormy relationship prior to Faulk severing their relationship during the Fall of 1978. (J.A. 48-49). Following their estrangement, the respondent threatened on at least six occasions to kill Faulk if he ever caught her with another man. (J.A. 48, 50-51, 56, 58, 61). Suspecting that Faulk was dating Browning, the respondent endeavored several days before the homicides to gain information regarding the couple's relationship "before [he] got mad and flew off the handle and did what [he] had to do." (J.A. 59).

B. The Trial

The primary issue litigated at trial was the identity of the perpetrator of the offenses. Although the direct

and circumstantial evidence conclusively established that the respondent was the guilty party, the respondent sought to prove that Sam Faulk (Joy Faulk's former husband) or Shirley Browning (Charles Browning's wife) actually committed the crimes.

Given the overwhelming evidence showing his participation in the slayings, the respondent (who did not testify) also attempted to establish that he was temporarily insane at the time of the commission of the offenses; that he was voluntarily intoxicated at the time of the commission of the offenses; and that he suffered from amnesia prior to and following the commission of the offenses.[3]

C. The Jury Instructions

After instructing the jury that it "should not single out one or more of [the instructions] to the exclusion of another or others but should consider each one in light of and in harmony with the others" (J.A. 182), the trial court gave extensive instructions pertaining to the state's burden of proof, the defendants' presumption of innocence, and the definition of reasonable doubt. (J.A. 182-184, 186-187, 190, 193).

The trial court also instructed the jury in reference to the elements of first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. (J.A. 182-189). In addition to defining the element

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[3]The respondent's jury instruction requests on the mitigating defense of diminished capacity were denied, as such a defense is not cognizable under state law. *See State v. Taylor*, 645 S.W. 2d 759, 762-763 (Tenn. Crim. App. 1982); *State v. Croscup*, 604 S.W 2d 69, 72 (Tenn. Crim. App. 1980).

of malice necessary to sustain a conviction for first degree murder or second degree murder (J.A. 186-188), the trial court gave the following offending instructions (J.A. 187-188):

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.
>
> • • •
>
> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense.

The trial court completed its charge by instructing the jury on the matters of insanity (J.A. 190-193), voluntary intoxication (J.A. 193-195), and amnesia (J.A. 195).

D. The Verdict and Subsequent Proceedings

After due deliberation, the jury returned a verdict finding the respondent guilty of the first degree murder of Joy Faulk and assessed punishment at life imprisonment. The jury also returned a verdict finding the respondent guilty of the second degree murder of Charles Browning and assessed punishment at ten (10) years imprisonment.

The respondent challenged the malice instructions at the first instance in the Tennessee Court of Criminal Appeals, which court held the instructions did not violate the rule of *Sandstrom*. (Pet. App. A-37—A-39). The court further held that the respondent could not have been prejudiced by the instructions in view of his defenses of nonparticipation and insanity. (Pet. App. A-39).

The respondent successfully sought relief in the district court upon the court's determination that the malice instructions were unconstitutional under *Sandstrom*. (Pet. App. A-13—A-15). Relying upon its perception of the defenses raised by the respondent, the district court found that the element of malice was a disputed issue at trial and thus refused to find the error harmless beyond a reasonable doubt. (Pet. App. A-16—A-20).[4]

On appeal from the judgment of the district court, the court of appeals agreed with the district court's determination as to the constitutionality of the malice instructions. (Pet. App. A-3—A-4). Finding that the respondent as-

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[4]The district court found that the respondent presented *mens rea* defenses of insanity, "mental-illness and voluntary intoxication," voluntary intoxication, and amnesia. (Pet. App. A-16-A-17, A-20).

serted defenses which established a ' "lack of *mens rea*' " (Pet. App. A-5), the appellate court declined to reverse the lower court's judgment "despite the substantial evidence of petitioner's guilt." (Pet. App. A-6).[5] The court indicated, however, that were it not for its prior precedent it would inquire as to whether the evidence of malice was " 'so dispositive of intent . . . that the jury would have found it unnecessary to rely on the presumption' " in determining whether the erroneous instructions prejudiced the respondent. (Pet. App. A-6).

SUMMARY OF ARGUMENT

A basic principle of modern American law provides that a defendant is not entitled to a reversal of the trial court's judgment unless he can show not only the existence of an error, but also some likelihood that the error was prejudicial to him. It is therefore settled that appellate courts reverse, even in cases of constitutional error, only upon finding a sufficient probability that the result would have been different but for the error.

In view of the Court's disposition of our petition for a writ of certiorari,[6] we do not appear before the Court to relitigate the issue of whether the jury instructions pertaining to the element of malice violate the principles set forth in *Sandstrom* and its progeny. Nevertheless, we

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[5]The court of appeals characterized the respondent's defenses as "mental illness and intoxication" and temporary insanity. (Pet. App. A-5).

[6]The grant of the petition was limited to Question 2.

believe it indisputable that the erroneous instructions could not possibly have affected the jury's finding of the existence of malice in the setting of this particular case.

We therefore submit: (1) that the jury instructions which incorporate a mandatory rebuttable presumption on the element of malice are subject to analysis under the harmless error doctrine; (2) that the existence of malice was not placed in dispute by the defenses raised by the respondent; and (3) that, in any event, the evidence of malice is overwhelming and so dispositive of the respondent's intent that the Court can confidently conclude that the erroneous instructions did not reasonably contribute to the jury's verdict.

ARGUMENT

I. SANDSTROM ERROR IN THE CONTEXT OF A MANDATORY REBUTTABLE PRESUMPTION IS SUBJECT TO HARMLESS ERROR ANALYSIS.

1. Modern American jurisprudence fully embraces the concept of harmless error in both constitutional and non-constitutional frameworks.[7] In *Fahy v. Connecticut*, 375 U.S. 85 (1967), the Court articulated for the first time

[7]Until recent decades, many appellate courts reversed convictions for trivial errors without regard to the doctrine of harmless error. *See* R. Traynor, *The Riddle of Harmless Error* 3-17 (1970) (hereinafter Traynor). Indeed, prior to the Court's decision in *Fahy*, errors of constitutional dimension consistently resulted in automatic reversals. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Bram v. United States*, 168 U.S. 532 (1897).

the rule that constitutional error may be deemed non-prejudicial and set forth the applicable test as "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Id.* at 86-87.

Chapman v. California, 386 U.S. 18 (1967) represents the Court's initial application of this rule of harmless error in a constitutional setting. There, the Court rejected the argument that "all federal constitutional error, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 21. While recognizing that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" *id.* at 23,[8] the Court affirmed its belief that in the context of a particular case some error may be deemed to have had no effect, or an insubstantial effect, upon the validity of the jury's verdict. The relevant inquiry thus focuses upon whether the reviewing court may confidently determine "beyond a reasonable doubt that the error com-

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[8]Such errors are generally of a fundamental nature and may be viewed as the functional equivalent of the total denial of trial. *See, e.g., Gideon v. Wainwright,* 372 U.S. 335 (1965) (denial of right to counsel); *Tumey v. Ohio, supra* (denial of impartial tribunal).

Other errors mandating automatic reversal are those whose prejudicial impact is inherently indeterminable on review or whose prejudicial nature is established by the very existence of error. *See, e.g., Strickland v. Washington,* 466 U.S. 668 (1984) (denial of effective assistance of counsel); *United States v. MacDonald,* 435 U.S. 850 (1978) (denial of right to speedy trial).

plained of did not contribute to the verdict obtained." *Id.* at 24.[9]

The harmless error doctrine is now so firmly entrenched in our system of criminal justice that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional errors." *United States v. Hastings*, 461 U.S. 499, 509 (1983) (emphasis added). *See also, e.g.*, *Brown v. United States*, 411 U.S. 223, 230-232 (1973); *Harrington v. California*, 395 U.S. 250, 254 (1969).

Indeed, when courts ignore this duty and "fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicality."'" *Hasting*, 461 U.S. at 509, quoting R. Traynor, *The Riddle of Harmless Error* 14 (1970), and Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925).

The affirmative obligation imposed upon the courts to apply the harmless error rule constitutes a recognition that important considerations counsel against the reversal of a conviction where the defendant has not been demon-

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[9]The Court has consistently applied this standard to determine whether errors of constitutional magnitude may be considered harmless in view of the weight of the evidence against the accused. *See, e.g., Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of right to counsel); *Milton v. Wainwright*, 407 U.S. 371, 377 (1972) (admission of confession in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Harrington v. California*, 395 U.S. 250, 254 (1969) (admission of confession in violation of right to confrontation).

strably deprived of his right to a fair and accurate adjudication of guilt or innocence. Such considerations include the need to prevent the duplication of a proceeding which was not adversely affected by the error, *see McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553, 555 (1984); *Hasting*, 461 U.S. at 509, and the desire to promote the public's "[respect] for the law and the administration of justice," *Stone v. Powell*, 428 U.S. 465, 491 (1976), without according the unharmed defendant a windfall.

2. Despite the general applicability of the harmless error doctrine to constitutional violations, the Court has yet to definitively address the issue of whether "an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of an offense," *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965, 1977 (1985), may be deemed non-prejudicial in the setting of a particular case.[10]

We submit that an erroneous mandatory rebuttable presumption on intent should not be classified with error so basic to a fair trial as to require automatic reversal, regardless of the strength of the proof establishing the element of intent and regardless of the factual and legal significance of the defendant's defense. Rather than view-

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[10]The Court has made clear that in terms of analyzing the *constitutionality* of a given instruction, no distinction exists between a conclusive presumption on intent and a mandatory rebuttable presumpton on intent. *See Francis*, 471 U.S. —, 105 S.Ct. at 1972-1973; *Sandstrom*, 442 U.S. at 519, 524. However, this threshold inquiry is not dispositive of the issue of whether a constitutionally defective mandatory rebuttable presumption may be subject to the rule of harmless error. *Francis*, 471 U.S. —, 105 S.Ct. at 1977, citing *Connecticut v. Johnson*, 460 U.S. 73 (1983).

ing the error in isolation, the Court should apply the harmless error doctrine in order to promote the essential purpose of a criminal trial, i.e., the determination of the defendant's guilt or innocence. *See United States v. Nobles*, 422 U.S. 225, 230 (1975).

The Court has previously indicated a willingness to apply the rule of harmless error to defective jury instructions in suggesting that the impact of the error must be evaluated in the context of the case and "not singled out and standing alone, but in relation to all else that happened." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Indeed, where a particular instruction is found to be wanting, the reviewing court is under a duty to examine the record and determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

By focusing upon the entire record, this approach to jury instruction error comports with the *Chapman* analysis which is used to determine whether the error is prejudicial. As expressed by Mr. Justice Rehnquist, writing for the Court in *Cupp*, 414 U.S. at 141:

> [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instructions of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

While a four-Justice plurality of the Court has opined that application of the harmless error doctrine is pre-

cluded in the context of a *conclusive* presumption on intent due to the possibility that the jury may have relied solely upon the presumption and not the evidence in reaching their verdict, *Connecticut v. Johnson*, 460 U.S. 73, 84-87 (1983),[11] this possibility is non-existent where, as here, the jury was instructed to "look to all the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice." (J.A. 188).[12] Thus, as in other settings involving instructional error, the impact of the *Sandstrom*-deficient instructions is determinable upon review of the entire record. *See, e.g., Hamling v. United States*,

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[11]The *Johnson* dissent soundly questioned the wisdom of the plurality's blanket dismissal of the application of the harmless error rule to the instruction under attack, noting that "(i)n every harmless-error case, there is always the possibility that the error affected the jury's verdict." *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting). The refusal of the dissent to accept the argument that the mere possibility that the jury disregarded the evidence of intent rendered its verdict subject to automatic reversal is consistent with the very nature of harmless error analysis. *See Harrington*, 395 U.S. at 254 (rejecting the argument that "we must reverse if we can imagine a single juror whose mind might have been made up because of [the erroneously admitted] confessions and who otherwise would have remained in doubt and unconvinced").

[12]By its very terms, the subject instructions contrast sharply with the infirm instructions found in *United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978) and *Morrissette v. United States*, 342 U.S. 246, 249 (1952), where the element of intent was expressly and unequivocally removed from the jury's consideration, and is clearly distinguishable from the *Johnson* instruction which was viewed by a four-Justice plurality as amounting to a directed verdict on the issue of intent. *Johnson*, 460 U.S. at 84-85.

Although this distinction would not appear to salvage the instructions' constitutionality, it does provide guidance for determining what harm, if any, may have resulted to the respondent under the facts of this case.

418 U.S. 87, 108 (1974); *Cupp*, 414 U.S. at 146-147; *Turner v. United States*, 396 U.S. 398, 421 (1970).

Despite its declination to apply the rule of harmless error to erroneous presumptive intent instructions, *see Francis*, 417 U.S. —, 105 S.Ct. at 1976 n. 8 ("when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside"); *Johnson*, 460 U.S. at 85-86 (where "the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict"), the Court's disposition of these cases suggests otherwise.[13] In *Francis*, the Court deferred to the Eleventh Circuit Court of Appeals' determination that the error was not harmless under the facts appearing in the record. *Francis*, 471 U.S. —, 105 S.Ct. at 1977. It went further, however, and independently concluded that "the evidence of intent was far from overwhelming" so as to preclude reversal. *Id.* Similarly, the *Johnson* plurality declined to disturb the state Supreme Court's refusal to evaluate the erroneous jury instruction for harmlessness, preferring to "leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has

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[13]Significantly, the *Sandstrom* Court did not reject the concept that an unconstitutional jury instruction can constitute harmless error under *Chapman* and its progeny. The Court chose instead to permit the Montana Supreme Court to make such a determination. *Sandstrom*, 442 U.S. at 526-527. On remand, the state court determined that the error was prejudicial. *State v. Sandstrom*, 603 P.2d 244, 245 (Mont. 1979).

taken the issue of intent away from the jury." *Johnson*, 460 U.S. at 87.[14]

Having established that the mandatory rebuttable presumption under consideration here is subject to application of the harmless error doctrine, we submit that the Court should undertake an independent evaluation of the effect of the instructions.[15] While the Court has indicated a tendency to defer to the lower courts in reference to the applicability of harmless error, *see Francis*, 471 U.S. —, 105 S.Ct. at 1977; *Johnson*, 460 U.S. at 87, 102; *Sandstrom*, 442 U.S. at 510, 526-527; *but see Harrington*, 395 U.S. at 254 (the Court's judgment as to whether constitutional error is harmless must be based on its own review of the record), the Court conducted its own evaluation of the proof in *Francis* and stated that its "primary task" in reviewing a lower court's harmless error determination "is to insure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis*, 471 U.S. —, 105 S.Ct. at 1977 n. 10.

It is submitted that the court of appeals and the district court inaccurately characterized the respondent's

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[14]The four dissenting Justices would have remanded for a harmless error determination by the Connecticut Supreme Court, suggesting that "there may be many cases in which the facts and circumstances so conclusively establish this element [of intent] that the instruction is wholly superfluous." *Johnson*, 460 U.S. at 96 (Powell, J., dissenting).

[15]Former Chief Justice Traynor of the California Supreme Court has stated that the Court's "responsibility to determine whether a right guaranteed by the United States Constitution has been denied necessarily encompasses the responsibility of determining the consequences that flow from the denial of that right, particularly whether reversal is necessary to vindicate the right." Traynor at 40.

defenses as those defenses are cognizable under state evidentiary law.[16] As a result, the lower federal courts' analysis of the applicability of the harmless error doctrine to this particular case are incorrect and further review by this Court is appropriate to insure a thorough and accuate evaluation of the defective instructions in relationship to the setting of the case.

II. THE RESPONDENT'S DEFENSES DID NOT PLACE IN ISSUE THE ELEMENT OF MALICE SO AS TO PRECLUDE HARMLESS ERROR ANALYSIS.

1. Error, even of a constitutional magnitude, does not generally warrant setting aside a conviction absent a demonstrable affect upon the outcome of the trial. *See United States v. Morrison*, 449 U.S. 361, 364-365 (1980). A four-Justice plurality of the Court has identified certain "rare" situations, such as where the defense relies upon alibi, insanity or self defense to establish innocence or non-culpability, in which a *Sandstrom*-poor instruction may permit the reviewing court to conclude that the error was harmless beyond a reasonable doubt. *Johnson*, 460

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[16]The court of appeals found that "among other defenses," the respondent presented defenses of mental illness and intoxication (i.e., diminished capacity) and temporary insanity. (Pet. App. at A-5). The district court characterized the respondent's defenses as non-participation, mental illness and intoxication (i.e., diminished capacity), insanity, voluntary intoxication, and amnesia "insofar as it reflected upon his state-of-mind" at the time of the commission of the crimes. (Pet. App. at A-16-17, A-20).

In contrast to the opinions of the lower federal courts, the Tennessee Court of Criminal Appeals determined that the respondent presented only two viable defenses: non-participation and insanity, both of which would have totally precluded a verdict of guilty if accepted by the jury. (Pet. App. at A-39).

U.S. at 87.[17] This exception to automatic reversal in the context of a conclusive intent instruction exists because the issue of intent is not in dispute at trial, *id.*, and certainly is applicable where there is no rule of automatic reversal in the context of a mandatory rebuttable intent instruction.

2. The jury's assessment of the defenses raised by the respondent, as those defenses are cognizable under state evidentiary law, could not have been affected by the erroneous instructions on malice. The primary thrust of the respondent's defense centered upon establishing his purported non-participation in the commission of the offenses.[18] Thus, "[a]lthough there was no explicit concession of intent and malice," *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir. 1985), cert. denied *Kemp v. Davis*, — U.S. —, 105 S.Ct. 2689 (1985), the intent of the individual responsible for the murders was not a contested issue. The jury's determination as to the existence of malice could therefore not have been affected by the defective instructions. *See, e.g., Davis*, 752 F.2d at 1521; *Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir. 1983), cert. denied 462 U.S. 1121 (1983); *United States v. Winter*, 663 F.2d 1120, 1144-1145 (1st Cir. 1981), cert. denied 460 U.S. 1011

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[17]Finding that the plurality's opinion would "create an automatic reversal rule whenever a *Sandstrom*-type instruction is given," the four dissenting Justices favored application of a traditional harmless error analysis without regard to the nature of the defendant's defense. *Johnson*, 460 U.S. at 90, 97-98 (Powell, J., dissenting).

[18]In presenting this defense, the respondent sought to have the jury accept his theory that Sam Faulk (Joy Faulk's former husband) or Shirley Browning (Charles Browning's wife) committed the murders.

(1983); *McGuinn v. Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied 445 U.S. 990 (1982).

3. The jury's consideration of the respondent's defense of insanity at the time of the commission of the crimes was likewise not adversely affected by the erroneous instructions on malice. In *United States v. Frady*, 456 U.S. 170 (1982), the defendant contended that he was entitled to a reversal of his first degree murder conviction on the basis that the jury instructions improperly relieved the Government of proving the element of malice beyond a reasonable doubt. *Id.* at 169-170. Finding that "the degree of prejudice resulting from instruction error [must] be evaluated in the total context of the events at trial," *id.*, the Court declined to reverse the defendant's conviction where he had failed to establish that the erroneous instructions "worked to his *actual* and substantial disadvantage" so as to infect the "entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis in original).

In reaching this disposition, the *Frady* Court concluded that regardless of what the jury may have believed as to the element of malice, it would not have found malice non-existent so as to reduce the grade of the offense where it had determined that the defendant premeditatively and deliberately killed the victim. *Id.* at 174.[19] Beyond this, however, "the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come

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[19]The Court went so far as to opine that under the facts of the case, "a finding of a premeditated and deliberate intent to kill [would] be [in]consistent as a matter of law with an absence of malice." *Frady*, 456 U.S. at 174 n. 19.

forward with a colorable claim that he acted without malice," *id.* at 172, compelled the Court to confidently state that there was "no substantial likelihood the erroneous malice instructions prejudiced Frady's chances with the jury." *Id.* at 174.

The analysis utilized in *Frady* is particularly applicable to the instant case where the respondent failed to introduce any colorable defense to call into dispute the existence of malice, and where, as we will argue shortly, the proof of mailce was undeniably overwhelming.

In reference to our contention that the respondent's claim of insanity was not adversely affected by the erroneous instructions, it is clear that the jury determined the existence of the element of malice *prior* to considering the validity of the insanity defense.[20] The jury thus evaluated the respondent's claim of insanity without regard to the manner in which malice was defined.

The very nature of the defense of insanity also compels the conclusion that the element of malice was not placed in dispute by the respondent's proof of insanity, as such defense acknowledges the elements of the offenses charged and simply disavows criminal culpability for their commiss . *See Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977). The defense of insanity is therefore, by definition, an exculpatory doctrine which is independent of the requirement of *mens rea*.

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[20]Under Tennessee law, the defense of insanity is considered by the jury only if it has first determined that the state has proven beyond a reasonable doubt the elements of the offense charged. *See* Tennessee Pattern Jury Instructions—Criminal 36.06 (1978). The jury in this case was instructed in accordance with this rule (J.A. 190), and it must be presumed that the jury correctly applied it. *See Johnson*, 460 U.S. at 85 n. 14.

The particular insanity defense presented here lends support to our position that the existence of malice was not disputed at trial. The respondent offered proof establishing that as a result of depression, he lacked substantial capacity to conform his conduct to the requirements of law. (J.A. 86-87, 94, 106, 111, 113-114).[21] By asserting an insanity defense grounded upon volitional impairment, as opposed to cognitive impairment (i.e., the inability to appreciate the wrongfulness of his conduct), the respondent did not challenge or rebut the state's theory that he maliciously committed the offenses. With the respondent's alleged inability to control his conduct at the time of the commission of the offenses not negating his ability to cognitively form the mental element of malice, the defective instructions had no effect upon the respondent's attempt to exculpate his conduct through the defense of insanity.

4. The remaining defense theories proffered by the respondent simply did not place the element of malice into issue under state evidentiary law. Although there was evidence that the respondent was intoxicated at the time of the commission of the crimes,[22] voluntary intoxication not resulting in settled insanity may negate only the element of premeditation and does not, as a matter of law, negate the element of malice. *See Harrell v. State*, 593 S.W.2d 664, 670-671 (Tenn. Crim. App. 1979); *Claiborne v.*

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[21]The respondent's proof thus comported with the definition of insanity under state law. *See Graham*, 547 S.W.2d at 543.

[22]The respondent told defense psychiatrist Dr. John Griffin that he had consumed six six-packs of beer and a pint or one-half pint of vodka on the day of the murders. (J.A. 97-98). That the respondent could physically consume this almost lethal amount of alcohol was sharply disputed by state's psychiatrist Dr. Samuel Pieper. (J.A. 160-161).

State, 555 S.W.2d 414, 418 (Tenn. Crim. App. 1977); *Pyburn v. State*, 539 S.W.2d 835, 840 (Tenn. Crim. App. 1976).[23] With the jury having been correctly instructed in accordance with the applicable law, the defective instructions could not have detrimentally affected the jury's consideration of proof of the respondent's voluntary intoxication as such proof related to a finding of malice.[24]

The respondent also presented proof that he was suffering from amnesia at the time of the commission of the

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[23]Under Tennessee law, second degree murder does not constitute a specific intent crime and thus voluntary intoxication does not negate a finding of malice. *State v. McKinney*, 603 S.W.2d 755, 760 (Tenn. Crim. App. 1980).

[24]The jury was instructed, in pertinent part, on the matter of voluntary intoxication (J.A. 193-195):

> You have heard evidence concerning the alleged drunkenness of the Defendant at the time of this offense. You are instructed that voluntary drunkenness is generally no defense to a criminal charge. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible for his conduct. This is so unless his drunkenness has continued for such a long period of time so as to result in settled insanity by the time of the offense. It is the duty of men to refrain from placing themselves in a condition which poses a danger to others.
>
> However, as an exception to this rule, voluntary drunkenness can be a defense to the crime of murder in the first degree, depending upon the fact whether the drunkenness prevented the deliberation and premeditation essential to constitute the crime of murder in the first degree.
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> • • •
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> Regarding the offenses of murder in the second degree or any lesser degree of homicide, voluntary drunkenness is no defense and can form the basis of no legitimate inquiry.

offenses.[25] However, as acknowledged by defense counsel during closing argument (J.A. 1038), amnesia alone is no defense to crime under state law, *Harrell*, 593 S.W.2d at 670-671; *Thomas v. State*, 201 Tenn. 645, 301 S.W.2d 358, 361 (1957), and does not constitute proof of the defendant's mental condition at the time of the commission of the offense. *Burton v. State*, 217 Tenn. 62, 394 S.W.2d 873, 878 (1965).[26] Again, with the jury having been correctly instructed with reference to the matter of amnesia, the erroneous instructions had no effect upon its finding of the existence of malice.[27]

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[25]Although the defense psychiatrists apparently believed that the respondent suffered from amnesia (J.A. 87, 115, 122, 137, 139), the state's psychiatrist indicated that a claim of amnesia was inherently inconsistent with the respondent's steadfast denial that he committed the crimes. (J.A. 158). Interestingly, the respondent himself disagreed with his psychiatrists' diagnosis of amnesia by maintaining that he "knew where he was and what he had been doing" at the time the offenses were committed. (J.A. 156, 165).

[26]While amnesia alone does not constitute a defense, it may be considered as it relates to the defendant's proof of insanity. *See Lester v. State*, 212 Tenn. 338, 370 S.W.2d 405, 408-409 (1963); *Sparkman v. State*, 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970). Given that the respondent's insanity defense rested upon his alleged inability to control his conduct, the respondent's purported inability to remember the details of the crimes does not undermine our position that he possessed the cognitive ability to form the element of malice.

[27]The trial court charged the jury with respect to amnesia as follows (J.A. 1098):

> Evidence may have been introduced indicating that the Defendant was suffering from amnesia at the time of the commission by someone of the crime of which he is presently accused. Amnesia is the inability to remember. The failure of the Defendant to remember the details of the alleged crime or to remember any of the facts leading up to and surrounding the commission of the alleged crime is in itself no defense to this charge.

The final defense sought to be developed by the respondent, diminished capacity, is simply not a cognizable defense under Tennessee law. *See State v. Taylor*, 645 S.W.2d 759, 762-763 (Tenn. Crim. App. 1982); *State v. Croscup*, 604 S.W.2d 69, 72 (Tenn. Crim. App. 1980).[28] The respondent's purported *mens rea* defense of "mental illness and intoxication" (Pet. App. A-5; *see also* Pet. App. A-16) was therefore no defense at all and could not have negated the jury's determination of malice as a matter of law.

III. IN ANY EVENT, THE EVIDENCE OF MALICE IS OVERWHELMING AND SO DISPOSITIVE OF INTENT AS TO RENDER THE SANDSTROM ERROR HARMLESS.

1. In determining whether error af a constitutional magnitude requires reversal of a defendant's conviction, the reviewing court must examine the entire trial record to assess the impact of the error on the jury's verdict. *See, e.g., Parker v. Randolph*, 442 U.S. 62, 71, 77, 80 (1979); *Milton v. Wainwright*, 407 U.S. 371, 372-373 (1972);

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[28]By definition, diminished capacity is not an exculpatory defense, but rather constitutes a mitigating doctrine which permits the jury to consider evidence of mental abnormality which, although insufficient to totally relieve the defendant of culpability for his criminal conduct, may lessen the grade of the offense. *See* W. LaFave & A. Scott, *Handbook on Criminal Law* 42 (1972).

The respondent submitted numerous jury instruction requests, three of which incorporated the concept of diminished capacity. (T.R., Technical Record 110, 111-112, 116). These instructions were refused by the trial judge, whose ruling was upheld by the Tennessee Court of Criminal Appeals on the bases that the requested instructions were not accurate statements of the law or were covered in the general charge. (Pet. App. A-36). Since the general charge omits any reference to diminished capacity, it is clear that the court applied state evidentiary law in determining that diminished capacity is not a recognized defense in Tennessee.

Schneble v. Florida, 405 U.S. 427, 431-432 (1972); *Harrington* 395 U.S. at 254.[29] While the "beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, this burden is satisfied in the context of *Sandstrom* error by demonstrating that "the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption" in reaching its verdict. *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting).

We submit that even a cursory reading of the record compels the conclusion that the evidence of malice was overwhelming and so dispositive of the respondent's intent as to constitute harmless error under the facts of the case.[30] In this regard, the proof shows that Joy Faulk and the respondent had been involved in a stormy relationship

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[29]It has also been suggested that it may be appropriate to consider whether the jury would have reached the same result had the error not occurred. *Milton*, 407 U.S. at 377; *Schneble*, 405 U.S. at 432.

[30]Under Tennessee law, malice is an intent to do injury to another or a design formed in the mind to do mischief to another. Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is not malice against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart fatally bent on mischief regardless of social duty. *Fox v. State*, 1 Tenn. Crim. App. 308, 441 S.W.2d 491, 495-496 (1968). Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. *State v. Johnson*, 541 S.W.2d 417, 418-419 (Tenn. 1976).

prior to Faulk terminating their relationship several months before the murders occurred on December 30, 1978. (J.A. 48-49). Following Faulk's termination of their relationship, the respondent threatened on six different occasions to kill her if he ever caught her with another man. (J.A. 48, 50-51, 56, 58, 61).

Suspecting that Faulk was dating other men, particularly Charles Browning, the respondent spoke with Browning's wife on December 24 and visited her on December 25 and December 26 for the purpose of determining the nature of the Faulk-Browning relationship. (J.A. 57-59). When Mrs. Browning refused to give him any information, the respondent made it clear that he was going to act upon his prior death threats by twice stating that he "just wanted to find out what is going on before [he] got mad and flew off the handle and did what [he] had to do." (J.A. 59).

At the time the respondent made this veiled threat, he was in possession of the murder weapon, a .25 caliber automatic pistol. (J.A. 60-61). The respondent had purposefully and deceptively borrowed the weapon from Terry Hill approximately two weeks before the murders (J.A. 74-75), telling Hill that his own gun had been stolen. (J.A. 80). With the proof showing that this was a bogus story inasmuch as the respondent's gun had actually not been stolen,[31] it is clear that the respondent obtained the murder weapon for the sole purpose of committing murder.

Having armed himself with the automatic pistol, the respondent chose the cold and rainy night of December 30

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[31]Under the pretense of his own gun having been stolen, the respondent obtained the murder weapon one week before Christmas. (J.A. 74-75). He subsequently and inconsistently maintained that his gun had been stolen on December 26. (J.A. 62-63).

to accomplish his stated desire to kill Faulk. Shortly after 9:00 p.m. that night, the respondent's truck was observed pursuing Browning's truck (in which Faulk, her six-year-old daughter and her three-year-old daughter were passengers) in a rural area of Rutherford County. (J.A. 14-15). Some ten miles from where this observation was made, Browning pulled into a driveway to permit the respondent to pass him on the roadway. (J.A. 16, 34).[32]

The respondent parked his truck behind Browning's truck, thereby positioning the victims between his truck and another vehicle. (J.A. 18, 34). In order to successfully perform his deadly task, the respondent left on the lights to his vehicle and approached the victims as they sat captive in the cab of Browning's truck. (J.A. 34-36). With the victims offering no resistance, the respondent placed his pistol inside the cab of the truck and began shooting. (J.A. 19, 27-28). Browning was shot once in the head from a distance of six to eight inches and Faulk was shot three times (twice in the head and once in the shoulder) from a distance of less than eighteen inches. (J.A. 23, 25, 28-29, 31-33, 35, 76-79).

After the respondent fled the scene of this carnage, Faulk's young daughters (who were miraculously not injured) crawled over the bodies and were found wandering along the roadway seeking assistance. (J.A. 34, 43). Shortly thereafter the respondent forced a high speed chase, during the course of which he discarded the murder weapon, and was apprehended by the police. (J.A. 10-13, 21-22).

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[32]Given that Browning pulled into the driveway of Faulk's former brother-in-law, it is entirely probable that he did so for the purpose of summoning help.

Under the particular facts of this case, the evidence of malice is overwhelming and so dispositive of intent that the Court can confidently conclude that there was no reasonable possibility that the erroneous instructions contributed to the jury's verdict. Since the error could not have prejudicially impacted upon the verdit, it was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circiut should be reversed.

Respectfully submitted,

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